SUPREME COURT, U. S.

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Supreme Court of the United States.

OCTOBER TERM, 1973.

No. 73-1144.

DR. PORTER L. FORTUNE, JR., CHANCELLOR, UNIVERSITY OF MISSISSIPPI, ET AL.,
Petitioners,

v.

EUGENE M. BAZAAR ET AL.,
Respondents.

Respondents' Brief in Opposition to Petition for Writ of Certiorari.

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Table of Contents.

Opinions below	1
Statement of the case	1
Argument	2
Conclusion	7
Appendix A— Findings of fact and conclusions of law of the United States District Court for the Northern District of Mississippi, No. WC-72-28-K, May 19, 1972	9

Table of Authorities Cited.

Cases.

Barton v. Sentner, 353 U.S. 963, 77 S. Ct. 1047, 1 L. Ed. 2d 901 (1957)	5
Bazaar v. Fortune, 467 F. 2d 570 (5th Cir. 1973)	5, 6
Cincinnati, New Orleans & Texas Pacific Ry. Co. v. United States, 400 U.S. 932, 91 S. Ct. 235, 27 L. Ed. 2d 240 (1970)	4
Ex Parte Young, 209 U.S. 123 (1908)	3
Flower v. United States, 407 U.S. 197 (1972)	8
Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970)	4
Graham v. Richardson, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971)	4
Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964)	3
Healy v. James, 408 U.S. 169 (1972)	5

Osborn v. Bank of United States, 9 Wheat. 738 (1824) 3

Papish v. University of Missouri Curators, 410 U.S. 667 (1973) 5

Shapiro v. Thompson, 394 U.S. 618 (1969) 4

State Department of Health and Rehabilitation Services v. Zarate, 407 U.S. 918, 92 S. Ct. 2462, 32 L. Ed. 2d 803 (1972) 4

Sterrett v. Mothers' & Children's Rights Organization, 409 U.S. 809, 93 S. Ct. 68, 34 L. Ed. 2d 70 (1972) 4

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) 5

Williams v. Baltimore, 289 U.S. 34 (1933) 7

Wyman v. Bowens, 397 U.S. 49 (1970) 4

STATUTES.

United States Constitution
First Amendment 5, 7
Eleventh Amendment 1, 2, 3, 4
42 U.S.C. § 1983 7

MISCELLANEOUS.

Federal Rules of Civil Procedure, Rule 23(b)(2) 7

Stern and Gressman, Supreme Court Practice, 4th Ed., 1969 5

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Opinions Below.

The unpublished order of the United States District Court for the Northern District of Mississippi, No. WC-72-28-K, May 19, 1972, appears in Appendix A of the petition for writ of certiorari; the bench opinion appears in Appendix A, herein.

Statement of the Case.

While this is not a case of first impression, petitioners seek to make it one by raising an Eleventh Amendment is-

sue for the first time in the Supreme Court. Suit was initiated in this case following petitioners' confiscation of respondents' literary magazine.

Neither the State of Mississippi nor any of its political subdivisions or agencies have ever been parties to this action. The District Court's restraining order was issued against the petitioners, individual employees of the University of Mississippi.

The expenditure of all monies for publication of *Images* magazine will in no way deplete the treasury of the State. The total cost of publication has not exceeded five hundred dollars. This money was appropriated voluntarily by students from s. 'ent funds.

Over the years University officials have offered the use of school equipment to various student publications for printing purposes. The student editors of *Images* agreed to pay for this service, and have done so from student funds. Because of this tangential relationship between the student editors and certain University administrators, petitioners argued at every stage of the court proceedings below that they were proprietors of the magazine, and were therefore entitled to censor a portion of the publication believed to be in "bad taste" and "inappropriate" for release. Petitioners now claim an Eleventh Amendment immunity.

Argument.

I.

The Eleventh Amendment does not bar a suit against individual college officials when student constitutional rights are involved. Suits against state officials who were directly responsible for unconstitutional conduct have been

permitted for at least one hundred and fifty years by this Court, and the Eleventh Amendment has served as no bar. *Osborn* v. *Bank of United States,* 9 Wheat. 738, 836-837 (1824). The Supreme Court has consistently adhered to the position that individuals acting under the banner of a State receive no protective shield from the Eleventh Amendment for unconstitutional acts. This Court stated in *Ex parte Young,* 209 U.S. 123, 159-160 (1908):

> "[T]he officer in proceeding under such [unconstitutional] enactment comes into conflict with the superior authority of [the] Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

Petitioners claim that jurisdiction is lacking because the relief ordered is mandatory, rather than prohibitory. The notion that "the king can do no wrong" and that monies from the State treasury should be protected against depletion from suits raising constitutional issues is one not encompassed by the Eleventh Amendment. While the doctrine of sovereign immunity may be used, if not waived, to protect such an interest, the Eleventh Amendment is primarily concerned with the idea of federalism. Any imagined distinction between the effect of the Eleventh Amendment on prohibitory and mandatory relief should have been resolved with the decision in *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964). There, this Court held that it would be appropriate for a federal district court to order the opening and maintenance, at government expense, of an

entire school system. The county school board raised, as one of its defenses, immunity under the Eleventh Amendment.

> "It is contended that the case is an action against the State, is forbidden by the Eleventh Amendment, and therefore should be dismissed. The complaint, however, charged that state and county officials were depriving petitioners of rights guaranteed by the Fourteenth Amendment. It has been settled law since *Ex parte Young*, 209 U.S. 123 (1908), that suits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment." (*Id.*, at p. 228.)

Mandatory injunctions against state officials are not rare, despite petitioners' claim that such relief is unavailable because of immunity. See, e.g., *Graham* v. *Richardson*, 403 U.S. 365, 91 S. St. 1848, 29 L. Ed. 2d 534 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

The Eleventh Amendment issue raised by petitioners in the case at bar has been rejected by this Court in several recent cases. *Sterrett* v. *Mothers' & Children's Rights Organization*, 409 U.S. 809, 93 S. Ct. 68, 34 L. Ed. 2d 70 (1972); *State Department of Health and Rehabilitation Services* v. *Zarate*, 407 U.S. 918, 92 S. Ct. 2462, 32 L. Ed. 2d 803 (1972); *Wyman* v. *Bowens*, 397 U.S. 49 (1970); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). In each of the above cases the Eleventh Amendment was unsuccessfully raised in the lower courts, and in each case on appeal, this Court summarily affirmed. Precedential value should be given the above cases as if decided on the merits. E.g., *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *United States*, 400 U.S. 932, 935, 91 S. Ct. 235, 27 L. Ed. 2d 240

(1970); *Barton* v. *Sentner*, 353 U.S. 963, 77 S. Ct. 1047, 1 L. Ed. 2d 901 (1957). See Stern and Gressman, *Supreme Court Practice* 197 (4th Ed. 1969).

II.

The petitioners have refused to allow the distribution of *Images* because of a disagreement over the content of the publication. The panel decision from the Court of Appeals found

> "It is not very clear in the record what types of hearings or evaluation this committee gave the magazine. There are allegations that it consistently refused to receive statements from the students or from their adviser, Professor Harrington. This panel of deans decided that publication would be 'inappropriate', apparently basing its decision on matters of 'taste'." *Bazaar* v. *Fortune*, 476 F. 2d 570, 572 (5th Cir. 1973).

The United States Supreme Court has decided that the First Amendment is applicable on school campuses. See *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969). This proposition is at least equally applicable to colleges and universities. *Healy* v. *James*, 408 U.S. 169, 180 (1972).

Petitioners should not be allowed to suppress an otherwise free press because of an opinion that a particular publication is in "bad taste." As this Court recently stated:

> "We think *Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish* v. *University of Missouri Curators*, 410 U.S. 667 (1973).

The record in the case at bar does not support petitioners' contention that the University of Mississippi had significant property rights in the magazine *Images*. The Court of Appeals for the Fifth Circuit found that

> "The facts before us in this case do not establish the University's claim that it here stands in the shoes of a private publisher. The evidence shows that the University's financial connection with this endeavor was somewhat tenuous. There was no special appropriation for this magazine. Rather, as envisioned from the outset, it was intended to be self-supporting, with the University supplying printing facilities, more or less on open account, with the costs for such services to be repaid from sale proceeds. The English department, it is true, agreed to underwrite any loss out of current funds, but this was expected to be irregular, small, and indeed hopefully never necessary. Furthermore, part of the financing for this current year came as a separate grant from the student activity funds of the Associated Student Body. As to considerations other than monetary, the University points to the fact that this publication will bear a statement saying that it is published by students at the University with the advice of the English department. We do not feel that this simple statement, even if joined with the somewhat speculative financial connection, is enough to equate the University with a private publisher and endow it with absolute arbitrary powers to decide what can be printed." *Bazaar* v. *Fortune*, 476 F. 2d 570, 573-574 (5th Cir. 1973).

Contrary to assertions by petitioners, the University of Mississippi has never granted course credit for efforts expended by students in publishing *Images*.

III.

This is not an action by one state agency against another state agency. Respondents filed their suit pursuant to Title 42 U.S.C. § 1983 as individuals, and not on behalf of *Images* magazine. This action was maintained under Fed. R. Civ. P. 23(b)(2) as a class action on behalf of all writers, as well as readers at the University. Petitioners now urge this Court to view the individual plaintiffs and the magazine *Images* as identical. This position is not supported by the record below, and is contrary to the pleadings.

To support their contention of no standing, petitioners cite *Williams* v. *Mayor of Baltimore,* 289 U.S. 36 (1933). In *Williams* the State legislature exempted a particular railroad from taxation for a period of two years. The legislature found that the railroad would be lost without such action, and that the company fulfilled a great social and economic need. The City of Baltimore sued the railroad for back taxes, and this Court ruled that

> "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Id.,* at 40.

Williams involved neither 42 U.S.C. § 1983 nor the First Amendment. In the case at bar, neither the respondents nor the magazine was created by the State, and obviously, neither is a municipal corporation.

Conclusion.

The respondents are now in their third school year since petitioners confiscated *Images* magazine. Petitioners refused student requests for administrative hearings, and

suppressed the magazine without notice and after conducting secret closed-door hearings. At the temporary restraining order hearing, petitioners' rationale for their actions was that the magazine was in "bad taste." The decisions and opinions by the District Court, original panel for the Court of Appeals and the Fifth Circuit, *en banc*, are consistent both with decisions from other circuits and with the decisions of the United States Supreme Court.

The petitioners would now seek to censor student publications by refusing to grant access to state-owned presses. The University of Mississippi continues to operate its printing presses and to make that machinery available to those publications which meet unenunciated standards of taste defined by the University. However, if students write unacceptable essays and stories, so argues the State, those students will be denied equal access, even if willing to pay for the services. The University forum is still open to those with conventional, uncontroversial views, but is closed to the respondents who are willing to pay for its rental.

At least until such time as the University is willing to deny its presses to all, it cannot deny them to some. This petition is premature and should be denied. See *Flower v. United States*, 407 U.S. 197 (1972).

Respectfully submitted,

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Appendix A.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

EUGENE M. BAZAAR ET AL.
v. No. WC-72-28-K.
PORTER FORTUNE ET AL.

FINDINGS OF FACT.

Images is a literary magazine which is published on the campus of the University of Mississippi; it has been an approved student publication since 1969. Students enrolled in creative writing and other English courses submit contributions to the editorial staff of the magazine. The staff, composed of students, with the assistance of a faculty adviser, reviews the submitted materials, and decides what items should be published. Usually, the selected items are reviewed by a faculty representative from the Department of English.

Three issues of the magazine appeared prior to the one in controversy. Two issues were released on campus as spring and fall editions during the school year 1969; in 1970 no issue was put out; a fall 1971 issue was published.

The plaintiffs are the student editors and contributors to the magazine, joined by a faculty representative of the English Department. Defendants are the Chancellor, other administrative officials, and the printer of the university.

In preparing the 1972 spring issue, the staff decided to dedicate it in honor of Dr. James E. Savage, a retiring university professor, in recognition of his many years of

distinguished scholarship and teaching. Various articles were submitted to the student editorial staff, selections made and, on or about May 18, 1972, the entire material, having been checked and reviewed, was delivered to the central duplicating department for printing. The task of printing normally takes two weeks. A May 1st deadline for delivery was anticipated.

Images has not merely been approved by the administration as a student publication but, in case its sales should be inadequate to defray the cost, any deficit is underwritten by the Department of English. The printing was to be done with university printing facilities. The Associated Student Body, however, has an interest in the magazine and has allocated $400 toward the publication costs for the current school year.

This present controversy began when, on May 4, 1972, the student editor was advised that a hold had been placed on the magazine in the hands of the printer. Mr. Bazaar, the editor, then undertook to ascertain from Dr. Fortune, the Chancellor, the reason for the hold and whether or not the magazine might be released. Time was important since the regular school semester was about to run out and only a few days remained prior to final examinations. Students sell the magazine on campus to those who want to buy it, and they have a limited supply for mailing to subscribers.

Dr. Fortune was not able to give the editor an immediate reply because of various commitments, but he did take steps by naming a ten-man ad hoc committee to review the manuscript and determine its suitableness for release as a university-sponsored publication. It had become known to Dr. Fortune and his associates that there were two magazine articles written by a university student, John Hubbard, which were quite controversial in that they were characterized by overly generous use of four-letter words. That

seems to be the main ground of complaint, although there were other concerns of a subsidiary nature.

The ten-man committee appointed May 5 by the Chancellor to decide the issue of appropriateness, met Monday, May 8, and also the following day, May 9. At the first meeting, the chairman of the committee, Dr. Noyes, circulated to each member of the committee—which represented a cross section of the faculty and also the president of the student body—a copy of *Images*, asked them to read the material and report back the next day. The committee reconvened the following day, when various viewpoints were discussed: (a) whether the material was obscene, (b) whether the material was vulgar, (c) whether the material had literary merit, (d) whether the release of the material would be detrimental to the university, and possibly other factors. There was no common ground of opinion reached by the committee except that by a vote of 8 to 1 they decided to recommend to the Chancellor that *Images* would be inappropriate for release as a university-sponsored publication. The committee filed a written report dated May 10 with Dr. Fortune, which is in evidence as Exhibit Fourteen.

Upon receipt of the report, Dr. Fortune determined that in the exercise of his responsibility as Chancellor he should consider the welfare of the whole university community as well as the public at large, particularly bearing in mind whether the university's image might be damaged by the release of this specific issue. His decision to hold the publication and not to allow its release, was based upon a conclusion that the two stories by Hubbard were "offensive to the moral values and sensitivity" of the community with which the university had definite relationships—the campus, the local community, and the state as a whole. It clearly appears that this judgment was not based on an evaluation of literary merit. This decision was communicated to the student publishers and contributors.

Within approximately a week thereafter, on May 17, suit was filed seeking a temporary restraining order from this Court, claiming the denial of First Amendment rights of free speech and free press of the student contributors and editors of the magazine.

The evidence before the Court shows that this is the first time that a situation has arisen in which the Chancellor or the administration found themselves under a feeling of obligation or duty to exercise censorship of a student publication. No university rule has been promulgated nor procedure adopted by the board of trustees that relates to censoring a campus publication. The committee named by the Chancellor was strictly to consider this case and none other; its function was to make a recommendation simply on the basis of appropriateness. The committee received no evidence and heard no witnesses. It obviously concluded that in passing on the question of appropriateness, a cross section of their own views would be reliable, and thus they acted upon nothing else. Their report was, of course, nothing more than a recommendation; the Chancellor had made it clear that he was not bound by the recommendation but exercised his independent judgment in the final decision.

The university authorities eschew any regime of censorship as a general method of controlling student opinion and they emphasize that the action here was dictated altogether because of the connection that the university had with *Images*. That connection, as the Court understands it, was: first, that it was authorized as a student publication; second, that it was printed by facilities of the university at the Central Duplicating Office; and third, that in the foreword or at some place in the publication reference is made to the fact that the magazine is published with the advice of the Department of English and the assistance of the Associated Student Body.

The evidence indicates that at this juncture only a very few days remain before the regular school session is concluded; that if this edition of *Images* is to be released and have effective circulation, it will have to be done without delay; that it is planned as a spring 1972 edition in honor of a retiring professor; that there is no assurance that the students contributing these articles, with the exception of Hubbard, the author of the two in question, will be returning to the university next year; and finally that the hold order on the publication casts real doubt upon the ability of this magazine to survive as an expression of students on the Ole Miss campus.

Much testimony has been presented in Court today by the plaintiffs on the issue of literary merit versus obscenity and the relation of four-letter words to an otherwise properly conceived literary composition, and other aspects of the questioned stories. The defendants have emphasized that they do not justify the suppression of this magazine as obscene, but simply on the ground of inappropriateness in view of the university's sponsorship of the magazine. Nor does it appear that the release of the magazine poses any threat to academic discipline, or other clear and present danger to an orderly operation of the university.

Based upon such findings, my conclusions of law are as follows:

Conclusions of Law.

It is well settled on the basis of the *Tinker* case, *Stacy* v. *Williams* and other federal cases familiar to counsel for both plaintiffs and defendants, that students who attend state-supported institutions have certain constitutional rights enjoyed by citizens as a whole, and those rights are not forfeited, lost or otherwise diminished by attendance at state-supported institutions. The law is further clearly

settled that university administrators are agents of the state, and while carrying out their responsibility in operating state educational institutions, are under a duty to comply with the United States Constitution.

From that very general proposition, we proceed to this: That the function of a state university is to educate those who attend, and it can dedicate its properties and facilities exclusively to that purpose. Although it may not be easy to define the scope of higher education, the authorities generally in charge of an institution certainly have the right to make a reasonable definition of what constitutes education for college youth.

When the authorities see fit to allow the institution on a university campus of publications by students, then students have the right to exercise free speech in the course of that student activity which is protected by the First Amendment to the United States Constitution. Thus, when the university administration authorized *Images* as a campus publication, it conferred upon the students who participate in that activity free speech and press rights protected by our fundamental law. Generally the people, i.e., the students who contribute to *Images*, the students who read it and others on campus who are interested in student expression, have the right to uninhibited or free press and unrestricted free speech.

Certainly the law recognizes some limitation upon that right. Whether we are concerned with an off-campus speaker, as in the *Stacy* case, or a student publication, as here, under the decided cases the university authorities may curtail these First Amendment rights only in the event of clear and present danger to the administration, such as frustrating the functioning of the university or disruption of or interference with the educational process, or elsewhere when the writing or speech exceeds all bounds of decency and becomes obscene or pornographic.

In these classes of cases, the Chancellor or the administration surely have the authority to take action that curtails student activity, but in every case they must do it in a way that comports with due process of law. In other words, whenever a university seeks to restrict expression for a legally cognizable purpose, it must act in a constitutional manner prescribed by the Fourteenth Amendment.

Now, in this case, what strikes the Court as fundamental are two points: First, we must declare that there is no recognized right to editorial judgment or censorship by an administration over student publications. The mere fact that a university may partly contribute to a publication or allow use of its printing facilities does not change the nature of the right. This Court rejects the contention made by defendants that by furnishing the printing press and possibly underwriting some of the deficit, the University of Mississippi acquires proprietary rights of a publisher, and may decide what may be published. This Court does not believe that factor may be recognized as altering the students' right to free speech and free press in the context of a university community. I see no difference between the university furnishing a forum for a campus speech and providing the facilities for a student publication. Both the speech and the publication are constitutionally protected activity.

There, I cannot recognize, and be faithful to the Constitution, that the university administration has the power of censorship on either what is said orally or what is written on the university campus. It cannot accept that which it thinks will be pleasing or beneficial to the community's image, or helpful to the university's image in the community or the state at large and reject that which it deems might be harmful to the university's interests. The administrators cannot pick and choose in this area. Any prior re-

straint on free expression is suspect, although not void per se.

In doing what he did, I am satisfied that Dr. Fortune acted in good faith. He is a person known for standing up for the rights of students and opposing censorship. But he undertook in this instance to exercise editorial judgment in a province which the Constitution forbids.

The foregoing proposition is enough to dispose of the case, for all that was done actually was to make a determination of the issue of appropriateness a criterion which is wholly irrelevant in a consideration of First Amendment rights.

Second, there might possibly have been a determination as to the issue of obscenity, or the existence of some clear and present danger, such as interference with academic discipline or the happening of some other substantive evil the university has a right to guard against. Had this been the apparent case, as you gentlemen at the bar know, it would be incumbent upon the administration to set up a procedure that would hear before it condemns, that would take evidence and give both sides an opportunity to be heard. And if the decision was to suppress the magazine on the ground of some legally cognizable basis, then the principle of *Freedman* v. *Maryland* comes into play. In any case of a prior restraint on free expression, the university is required promptly to seek judicial approval of what it may censor.

The *Freedman* doctrine places on the university a burdensome duty often not easy to discharge. But what the principle does assure is that everything that the Constitution says shall be free speech shall be uninhibited. And if a limitation on that right is asserted, the burden is on the one who would limit it, first, to have a due process hearing to ascertain if the issue can fairly be resolved, and, second,

if the determination results in suppressing or forbidding student expression, then the university administration must seek an early judicial approval of the restraint. This procedural rule was not complied with here in any essential degree.

If there had been in the minds of the university administration a contention that the Hubbard stories were obscene, we would be confronted with the fact that obscenity is not easy to determine because of the definition that the Supreme Court fashioned in the *Roth* v. *United States* case, where a three-prong test was stated. The first consideration is whether the material taken as a whole appeals primarily to the prurient interests of the average person, or whether the dominant theme appeals to the prurient interests of a person. The second is whether the material is patently offensive because it goes substantially beyond the customary limits of candor in the description of sex and the like. The third test is whether the material is utterly without redeeming social value.

In this case, as I understand the established law, if the university saw fit to halt the publication of *Images* on the ground of obscenity, it or the Chancellor would have had to institute a procedure whereby both sides could be presented, evidence taken and a decision made on whether the material in the two Hubbard stories was obscene by the *Roth* standard.

Moreover, had the decision been that the magazine was obscene by this test, under the principle of *Freedman* v. *Maryland,* the administration, since it was placing a prior restraint on free expression and student press, would have had to promptly seek judicial approval of the restraint. Only in this way is the danger of arbitrary censorship avoided. See *Marcus* v. *Property Search Warrant,* 367 U.S. 717.

Now, I am sure that most anyone should realize that the controlling rules of law impose a significant burden on the authority who attempts to curtail or limit free speech and the right of a free press. Indeed it does. But our system of laws and our Constitution were built on that very predicate, and there we must stand or fall. No doubt, many well-meaning persons, if they were devising a constitution today, would not adopt such views. However, that is not the point; these principles are imbedded in our laws and they control this case. It is my duty to vindicate those principles in this action.

This is an important case. It is important not merely to the university, but to these students and the faculty, and indeed to the state as a whole.

This Court concludes that the action of the university administration, well-intended though it may have been, did transgress the Constitution of the United States in that the First and Fourteenth Amendments were violated. This is the kind of country that we live in and the kind of Constitution we have.

The Court further finds that irreparable injury exists because of abridgment of constitutional rights and the suppression of free speech, and the plaintiffs are entitled to a temporary restraining order prohibiting defendants from interfering with the binding and release of *Images* or in any way impeding its distribution and sale on the university campus. An order shall issue accordingly.